

Internal Revenue Service  
**memorandum**

CC:TL:TS/P  
ESHATZ/crs

date: AUG 6 1991

to: District Counsel, Des Moines  
Attention: William Eddy

from: Chief, Tax Shelters/Partnerships Branch

subject: [REDACTED]

TL-N-1131-91  
Shatz Wilson Des Moines  
I.R.C. §6223(e), §6229

This is in response to your request for tax litigation advice submitted to our office on May 17, 1991.

ISSUES

1. If a notice of Final Partnership Administrative Adjustment is sent to a partner at an incorrect address and is never received, is an assessment based on the FPAA invalid as to that partner?
2. Is the statute of limitations for assessing partnership items tolled during the period the Service fails to provide adequate notice to a partner ?

CONCLUSIONS

1. Yes, an assessment based upon a FPAA mailed to an incorrect address should be abated because the FPAA does not satisfy the notice requirements of section 6223(a).
2. No, since the statute of limitations has expired for assessment of partnership items, the procedures set forth in section 6223(e) for providing late notice to partners are inapplicable.

FACTS

[REDACTED], a partnership, was formed in [REDACTED] for the purpose of holding securities.

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On [REDACTED], the tax matters partner of [REDACTED] executed a Form 872-O Consent to Extend Time to Assess Tax for the partnership's [REDACTED] taxable year. [REDACTED] and [REDACTED] partners in [REDACTED], had previously executed a Form 872-A Special Consent to Extend Time to Assess Tax for the [REDACTED] tax year.

Neither the tax matters partner nor the [REDACTED] submitted a Form 872-N to the Commissioner terminating the special consents. However, the terms of the consent executed by the [REDACTED]'s provided that the period was extended to the ninetieth day after a statutory notice was mailed to the taxpayers. The consent does not specifically reference the partnership items.

An FPAA was sent to the tax matters partner on [REDACTED] containing adjustments for the partnership's [REDACTED] tax year. In addition, an FPAA was sent to the [REDACTED] on [REDACTED], at the address listed on their [REDACTED] Form 1040. This was not the address reflected on their K-1's for [REDACTED], [REDACTED], or [REDACTED]. Nor is it the address listed by the [REDACTED] on their Form 1040's for [REDACTED], [REDACTED] or [REDACTED]. The FPAA was never received by the [REDACTED].

Neither the TMP nor any other partner of [REDACTED] filed a petition for readjustment of partnership items with respect to the FPAA. The other partners entered into settlement agreements with the Commissioner.

A statutory notice of deficiency was sent to the [REDACTED] on [REDACTED], setting forth additions to tax attributable to their investment in [REDACTED]. On [REDACTED], the [REDACTED] timely petitioned the Tax Court. In their petition they state that the statute of limitations has expired with respect to making adjustments with respect to their investment in [REDACTED].

A notice of FPAA has not yet been sent to the correct address of the [REDACTED].

#### ANALYSIS

The first issue to be addressed is whether the failure of the Service to mail the FPAA to the [REDACTED]'s proper address renders the FPAA invalid with respect to them. Your office has concluded that the FPAA is void and the assessment made invalid. We agree that the assessment based on the FPAA should be abated.

Under section 6223(a), the Secretary is required to mail FPAA's to each partner entitled to notice as set forth in section 6223 (a) and (b). The notice must be mailed to the partner within 60 days from the date on which the FPAA is mailed to the TMP. In this instance the [REDACTED] have yet to receive proper

notice as set forth in section 6223(a). Although the Tax Court held in Triangle Investors Limited Partnership v. Commissioner, 95 T.C. 610 (1990), that the Commissioner may rely on the information contained in the return for the year in issue, except as modified by additional information received in accordance with the regulations for the mailing of the FPAA, there is no indication in this case that this procedure was followed. Therefore, we agree with your conclusion that the FPAA mailed to the [REDACTED]'s incorrect address does not satisfy the requirements of section 6223 (a), and, further, that the assessments based on the defaulted FPAA should be abated.

The second issue is whether the statute of limitations is still open. You have concluded it is not and we agree. The consequence of failing to provide the proper notice to a notice partner is set forth in section 6223(e), which provides the remedy for such a partner upon the belated mailing of an FPAA to the correct address. <sup>1/</sup> The remedy is to allow the partner to make an election in or out of the partnership proceeding. If the proceeding is finished, the partner has the option, under section 6223(e)(2), to be bound to the results of that proceeding (i.e. to "elect in"). If the proceeding is ongoing, the partner has the option, under section 6223(e)(3), either to accept any pending settlement offer or to have the partnership items treated as non-partnership items (i.e. to "elect out").

Since the proceeding in this case is finished, section 6223(e)(2) is applicable. The computation of the correct period of limitations under section 6223(e)(2) can be complicated. The complication is that when the IRS does belatedly mail an FPAA to a partner's correct address after a proceeding has been finished, and that partner does not elect in, then that partner's partnership items automatically convert to nonpartnership items, sections 6231(b)(1)(D) and 6223(e)(2) (last sentence). This conversion, like all conversions (except settlements), gives the IRS a one year cushion under section 6229(f) to issue a statutory

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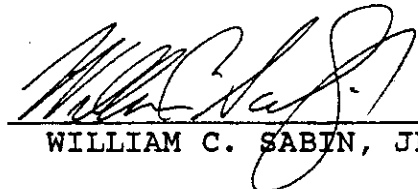
<sup>1/</sup> The first sentence of section 6223(e)(2) makes specific reference to this belated FPAA, but no such reference is found in section 6223(e)(3). However, both logic and the applicable regulations suggest that both (e)(2) and (e)(3) are contingent upon an FPAA being sent to a correct address upon discovery that the original was incorrectly mailed. See Temp. Treas. Reg. § 301.6223(e)-2T(c).

notice pursuant to section 6230(a)(2). Adding to the confusion is the fact that this one year period is deemed to begin to run on the date that the IRS mailed the correctly addressed FPAA, Temp. Treas. Reg. section 301.6223(e)-2T(a)(2). 2/

However, the IRS can only have this cushion if, upon the date of the conversion, the relevant statute of limitations for the partnership items is still open. See section 6229(f) (first sentence). In this case a valid FPAA had been issued to the TMP. Therefore the applicable statute was section 6229(d). The existence of the Form 872-0, executed by the TMP, does not alter this because the terms of that agreement provide for exactly the same result as section 6229(d). The existence of the Form 872-A, executed by [REDACTED], also does not alter this because the terms of that agreement do not provide for partnership items as is specifically required by section 6229(b)(2).

Under section 6229(d), the IRS had 1 year and 150 days after the issuance of the FPAA to the TMP in this case to assess partnership items. The FPAA was mailed to the TMP on [REDACTED]. The 150 day period in which an action under section 6226 could have been brought expired on [REDACTED]. The statute of limitations on assessing [REDACTED]'s partnership items therefore expired on [REDACTED]. Thus, the statute of limitations has expired.

If you have any further questions please contact Eileen Shatz at FTS 566-4369.

  
WILLIAM C. SABIN, JR.

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2/ Under Temp. Treas. Reg.. section 301.6223(e)-2T(c), the partner has 45 days after the mailing of the FPAA to make an election. If he fails to make the election by the end of that period, then the conversion is deemed to have occurred at the start of that period, Temp. Treas. Reg. section 301.6223(e)-2T(a)(2). The result of this curious construction is that the IRS does not really get a one year cushion to issue a statutory notice because it can never know that a partner has failed to make an election until 45 days into the one year period has elapsed. Therefore, at best, the IRS will have a 10 1/2 month period (1 year - 45 days) to issue a statutory notice.